IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/T/87/2010**

In the Matter Between:-

REX	**CROWN**
AND	
KOBONG RANOHA	**1ST ACCUSED**
TŠELISO TETSOANE	**2ND ACCUSED**
SEKEI MAKHETHA	**3RD ACCUSED**
MALUKE NKIEBE	**4TH ACCUSED**

JUDGMENT

CORAM	**:**	**MOKHESI J**
DATE OF HEARING	**:**	**13TH NOVEMBER 2019**
DATE OF JUDGMENT	**:**	**12TH DECEMBER 2019**

CASE SUMMARY: *Criminal law: murder- common purpose- change of plea of not guilty to murder charge to plea of guilty to lesser charge of assault not charged, in medias res-applicable principles examined, when such may be allowed- accused ultimately found guilty of assault common.*

ANNOTATIONS:

STATUTES : *Criminal Procedure and Evidence Act No. 9 of 1981*

BOOKS : *Principles of Criminal Law 2nd Ed. 393*

M.P Mofokeng *Criminal Law Through Cases* (1997,Morija Book Depot)

CASES : *S v Brown (681/2013) [2014] 1 ALL SA 452 (SCA), 2015 (1) SACR 211 (SCA)*

S v Mgedezi 1989 (1) SA 687 (A) at 705 I – 706 B

Magmoed v Janse van Rensburg and Others 1993 (1) SA 777(A) SACR 67

S v Singo 1993 (2) SA 765 (A)

S v Thebus and Another 2003(6) SA (CC) 505

Kekana v The State (498/2015)[2015] ZASCA 194

Per Mokhesi J

[1] Accused was arraigned before this court on a charge of murder. Initially there were four of accused but the first three have been at large since the year 2013. Only the fourth (A4) accused has been coming to court, and after several postponements and fruitless issuance of warrants of arrest for the other three accused, the Crown decided that it would be prudent to apply for separation of trials and to proceed against A4. It is alleged in the charge sheet that the accused are charged with the crime of murder, in that upon or about the 11th day of February 2010, and at or near Seforong in the district of Quthing, the said accused did all, each or the other or all of them did unlawfully and intentionally kill the deceased Mlungisi Mavela.

[2] The accused pleaded not guilty to the charge. In terms of section 273 of the **Criminal Procedure and Evidence Act No. 9 of 1981** the following admissions were made and read into the record of proceedings;

a) Report of the scene of crime by No. 7804 Detective Trooper Nthake marked EXH.A. He intimates that after receiving the report of the deceased's death he proceeded to Seforong accompanied by Detective Constable Letseka, and that at the scene of crime near the bush he found the deceased's body covered with a blanket. After undressing the corpse they discovered that the deceased has sustained whip marks all over the body, bruises on the stomach and the back, and small scratches on the scrotum.

b) Report of arrest by NO. 4395 Detective Constable Letseka marked EXH.B

c) Report of arrest by NO. 52780 Police Constable Liphoto, marked EXH.C.

[3] Apart from these admissions, the Crown case was based on the evidence of a single witness, one Thabo Pule. After testifying, the defence opted not to cross-

examine him, but instead intimated that they were changing their plea to now plead guilty to assault. This procedure was resisted by Mrs Mofilikoane, for crown, and refused by the court. I will revert to this aspect of the case in due course. After the court had turned down their change of plea, the defence opted not to enter the witness-box, but instead closed its case.

[4] PW 1, Mr. Thabo Pule's evidence is to this effect: He knows the accused very well as they are neighbours. He also knew the deceased as he was his uncle. The other accused who are still at large were well known to him as well. On the 11th February 2010 one Kobong Ranoha (A1) reported that the animals he had been herding had gone missing. He was reporting thus to the Chief. He further told the Chief that he had already arrested four suspects in relation to the missing herd, and that those arrested individuals were implicating the deceased in the theft of the animals. Immediately, the Chief organized a search party headed by PW 1. The purpose of the party was to go and fetch the already arrested individuals and to look for the deceased as a suspect. They set out, all on horseback to the place named Thaba-Kholo where the arrested suspects were kept. They arrested the deceased at the same place. The search party was made of five men. When the deceased was arrested, his upper arms were fastened to his back using a rope. After he was thus fastened, the accused (A4) and one Sekei (at large) beat the deceased using sjamboks/whips. PW1 says he tried to stop the accused from whipping the deceased but they would not listen. He said they continued to whip the deceased even after he had reprimanded them. After being arrested, the deceased was driven to another place. The deceased was walking, while the rest were on horseback.

[5] While on the way, PW1 took a detour to his cattle post and left the accused with the deceased. After PW1 Had gone to his cattle post to conduct some inspection, as the said cattle post was within a shouting distance, he was called back and told that the deceased was revealing where the cattle were. He said he only took about five minutes at his cattle post. He immediately rushed back, and on his arrival, he quickly realized that the deceased was tired and seemed to be in a lot of pain. He immediately told the accused to loosen the rope and they obliged. PW1 then asked the deceased where the cattle were, the latter said they were at the place called

Potebere cattle post. When PW1 had rushed back to where the deceased was he found that A4 (current accused) and Ranoha (A1) had rushed to Potebere where the deceased said the cattle were, so, the deceased was with Sekei and Seabata.

[6] PW1, Seabata, Sekei and the deceased following A4 and Ranoha(A1) headed to Potebere cattle post, whereat they found two herd boys who denied any knowledge of the missing cattle. While they were at Potebere probably angered by noticing that the rope which was fastening the deceased had been loosened, and the fact that the deceased was supposedly being evasive, Ranoha tightened the rope and resumed the whipping of the deceased. PW1 rebuked them one by one. A4 listened and stopped whipping the deceased while the other three men continued unabated to whip the deceased. He said at this time the deceased was "very tired". The whipping continued until they reached a place called Phuleng when PW1 realised that the deceased was so exhausted that he felt the deceased would not make it. It must be recalled that the four men were on horseback but for the deceased who was walking on foot. At this time A4 had stopped whipping the deceased. Ranoha was the most consumed by anger, understandably because the stolen cattle belonged to his employer. Ranoha continued to pound the deceased. When they arrived at Ha-Malefane, as the deceased was struggling to walk, Ranoha (A1) pulled the deceased with the rope. PW1 alighted his horse and tried to stop Ranoha, but to no avail. It was at this point that Ranoha turned against PW1 and accused him of protecting the "thief" because he was his nephew.

[7] As they approached Seforong, PW1 alighted the horse and other men proceeded ahead and left him behind. He testified that as he followed behind the party, while at Seforong pass, he saw A4, Sekei and Seabata on the other side of the stream, while the deceased and Ranoha were on the opposite site of the same stream. PW1 said the deceased was very tired. As the deceased had asked for water, pw1 left in search of same. Along the way he met Maluke (A4), Sekei and Telang. PW1 decided not to fetch water but instead went to Ranoha's employer, and with whom they rode on horseback back to where the deceased and Ranoha were. On the way they met Telang Sehloho who told them that the deceased had passed on.

[8] After the Crown had concluded leading evidence of PW1, Advocate Lesutu for the accused (A4) intimated that A4 was changing his plea of not guilty to murder to guilty of assault. The crown was not amenable to this change of plea midway through the proceedings, and this court accordingly rejected it. The court rejected the change of plea because the defence was proceeding from the premise that it was their right to change a plea in this manner. After this court had rejected the change of plea to a plea of guilty to a lesser charge than the one charged, the accused opted not to cross-examine PW1 or enter witness-box to testify in his own defence. He accordingly closed his case.

[9] Change of plea *in medias res* to a plea of guilty to a lesser charge than the one charged:

It will be observed that when Advocate Lesutu intimated that the accused was charging his plea of not guilty to murder, to guilty of assault, he seemed to be labouring under the impression that he was entitled to do so as of right. My view is that the accused's situation was worsened by the fact that Advocate Mofilikoane for the Crown was not amenable to this change of plea to a lesser charge. The principles applicable to change of plea can be stated as follows: Once the accused has pleaded not guilty to a charge and the prosecution accepts it and leads evidence to prove the charges, the ball is firmly in the court's court to play. The plea of not guilty bestows a duty on the court to determine the issues between the Crown and the accused(s). The court's duty in that regard cannot be interfered with either by the Crown in agreement with the accused, or the accused acting alone, to charge a plea, without the court's consent. These issues were aptly articulated in the decision of ***S v Brown (681/2013) [2014] 1 ALL SA 452 (SCA), 2015 (1) SACR 211 (SCA) at para. 100*** where the Court of Appeal (South Africa) approved Kruger *Hiemstra's Criminal Procedure* (2013) at 17 – 12 wherein the following was said:

> "(i) At the beginning of the case, when the accused is asked to plead. The case is then still in the hands of the prosecutor from accepting a plea of guilty on the charge as [it] stands, or on an alternative or permitted other charge (S v Cordoso 1975 (1) SA 635 (T); S v Mlangeni

1976 (1) SA 528 (T),; S v Sethoga and others 1990 (1) SA 270 (A) at 274 I – 275 G. If the prosecutor accepts a plea of guilty to an alternative or other charge, the main charge falls away and the accused cannot be convicted of it (S v Ngubane 1985 (3) SA 677(A) at 683). The Court at 683 E described such acceptance as a *sui generis* act by which the prosecutor limits the ambit of the *lis* between the state and the accused in accordance with the accused's plea.

(ii) In the course of the case, and after the accused, by a plea of not guilty, has joined issue with the state. If often happens that the accused in the course of the trial changes the plea to one of guilty to a lesser offence which is then a competent verdict on the charge in question, which the prosecutor may accept. In the Sethoga case supra at 274 I – 275 G the Appellate Division explained the fundamental distinction between acceptance of a plea by the prosecutor before and after the beginning of the trial. Before the trial commences, i.e. at the plea stage, the prosecutor is *dominus litis* and as such is entitled, by means of acceptance of a plea of guilty to another offence, to limit the *lis* between the state and the accused in accordance with the plea. However, as soon as the trial has commenced, the duty rests on the court to adjudicate the case as defined by the charge and the plea. The prosecutor cannot interfere with the exercise of this duty; he or she cannot at this stage by the acceptance of a plea limit the court's functions of adjudication. Such limitation requires the consent of the court."

(See also M.P Mofokeng; *Criminal Law and Procedure Through Case*s (1997, Morija Book Depot) at p. 398).

The accused has no right, as was suggested, to change a plea of not guilty to murder charge to plea of guilty to a lesser competent offence of assault, without the court's consent, in *medias res.*

[10] Common Purpose

The accused (A4) is charged with murder of the deceased acting in common purpose with the other accused who are still at large. The leading case as regard the invocation of the doctrine of common purpose is ***S v Mgedezi 1989 (1) SA 687 (A)*** at 705 I – 706 B:

> "In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed, and performed his own act of association with recklessness as to whether or not death was to ensue."

[11] In terms of this doctrine, liability for commission of a crime is by attribution to individuals who partook in the crime (Burchell and Milton ***Principles of Criminal Law*** *2nd Ed.* 393). For attribution of liability to be imposed, the accused's participation in the crime should flow from either of the following scenarios; (a) By prior agreement, express or implied between the participants to commit an offence: or (b) It may arise from impulsive participation (without prior agreement) (***Magmoed v Janse van Rensburg and Others 1993 (1) SA 777(A) SACR 67 at 810 G).*** In addition to participating impulsively, there must be a requisite state of mind (*mens rea)*. The accused must have intent, in common with other participants in the crime charged and must have actively associated himself with the conduct of other participants to achieve a common purpose of committing a substantive crime charged (***S v Singo 1993 (2) SA 765 (A) at 772 D – E****)*

[12] It is a duty of a trial judge when dealing with the doctrine of common purpose "…to exercise utmost circumspection to evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court

must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other perquisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case." (***S v Thebus and Another 2003 (6) SA 505 (CC) at 531 C – E***)

[13] Against the background of the above principles, I now turn to consider whether the Crown has succeeded in discharging its onus against the accused beyond a reasonable doubt. It is not the Crown's case that there was a prior agreement between the accused, rather that the accused actively associated himself with the conduct of other accused to achieve a common purpose of murdering the accused. It needs to be recalled that when the accused set out on horseback on the fateful day, their sole intention was to search for stolen herd of cattle and arrest the suspected thieves (the deceased was one of those suspects). The accused was part of the search party which set out to achieve the above goal on the instruction of the village chief. When the search party caught up with the deceased as he was fingered in the disappearance of the cattle, he was whipped with sjamboks, ostensibly to extract a confession from him and to point out the missing herd. This beating took place from the time the deceased was assaulted at Thaba-Kholo until they got to Qhafutsong when PW1 took a detour to his cattle post to do some inspection.

[14] When PW1 returned, Maluke (A4) and Kobong (A1) had gone to Potebere where the deceased had told them the cattle were. When they got to Potebere angered by the fact that the deceased had sold them a dummy, assaults continued, but on being reprimanded by PW1, A4 desisted from assaulting the deceased. This was the last time A4 laid his hands on the deceased. Ranoha and others however, did not stop the assaults but instead continued with more zest and determination. They ignored PW1's calls to stop assaulting the deceased. Ranoha even tightened the rope which tied the deceased's arms at the back. The assaults continued until the party reached Phuleng where the deceased showed signs of exhaustion. Ranoha at this stage was even pulling the deceased with the rope whilst the former was riding a horse. A4 was walking along and had stopped beating the deceased.

Ranoha belaboured the deceased over a long distance, and would not stop even when he was directed to, by PW1. At Seforong, Ranoha was the one who was with the deceased while A4 and other men had crossed to the other side of the stream. Ranoha's assaults continued ferociously unabated. With these brief facts it is clear that even though the accused (A4) participated in the assaults there was no intention to commit murder, direct or *dolus eventualis*. The accused had actively disassociated himself from the assault of the deceased on being reprimanded by Pw1. The deceased was pounded by other accused over a long distance after the accused had disengaged. What compounds the Crown's case further is lack of medical evidence as to what led to the deceased's death. The reason for this is that post mortem examination was not performed on the deceased. It is not clear why the police allowed this to happen. From the evidence this court can only find the accused guilty of assault common.

[15] In the result accused is found guilty of assault common.

My assessors agree.

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MOKHESI J

FOR THE CROWN : ADV. MOFILIKOANE

FOR THE ACCUSED : ADV. LESUTU

[16] Mitigation and sentence

I now turn to consider sentence. The accused was a young boy of twenty years when he committed this crime. This aspect should count in his favour. The fact of youthfulness clearly shows that there is a possibility of rehabilitation, as "[t]heir participation in crimes may well stem from immature judgment, from as yet unformed character, from youthful vulnerability to error and impulse."(***Kekana v The State (498/2015) [2015] ZASCA*** 194 at para.10). Also to count in his favour is the fact that he is the first time offender. I am not at all underplaying the role which the accused played in this case. He initially participated in the whipping of the deceased, even though he later disengaged. The deceased was whipped merely based on suspicion of having stolen livestock. The accused were not entitled to take matters into their own hands even if they felt strongly that the deceased may have had a role to play in the theft of the livestock. Our society cannot countenance a behavior which was exhibited by the accused in this case.

[17] In the result

The accused is sentenced to twelve months imprisonment without an option of a fine. The whole sentence is suspended for six months on condition that the accused is not found guilty of committing an offence involving assaults.

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MOKHESI J

FOR THE CROWN: ADV. MOFILIKOANE

FOR THE ACCUSED: ADV. LESUTU